

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





To be argued by  
Harold L. Goerlich

**77C227**

United States Court of Appeals  
FOR THE SECOND CIRCUIT

ORIGINAL

**77-2033**

JOSEPH ADDOLORIA,

Petitioner-Appellant

-against-

United States of America

Respondent-Appellee

On appeal from the United States District  
Court for the Eastern District of New  
York (Platt, D.J.)

APPELLANT'S BRIEF & APPENDIX

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## PRELIMINARY STATEMENT

This is an appeal from a final order of the U.S. District Court, Eastern District of New York (Platt, D.J.) dated February 28, 1977, denying Petitioner-Appellant's application to vacate, correct, amend or reduce a sentence imposed upon him by the Court on November 21, 1975 (75 CR 275) for a term of nine (9) years imprisonment (with specific direction that it was under 18 USC 4208 (a) (2)).

No papers in opposition were submitted by the government (Respondent-Appellee).

For his brief herein the Petitioner-Appellant relies on his memorandum of law submitted in the Court below, which follows hereafter.



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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

JOSEPH ADDOLORIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM IN SUPPORT OF  
PETITION TO CORRECT SENTENCE

Introduction

On November 21, 1975, this Court sentenced petitioner Joseph Addoloria, to the custody of the Attorney General for a term of nine years imprisonment on Count One, on counts two and three for 5 years suspended, No. 75CR 275. The Court explicitly directed and ordered that the counts were to be under the provisions of 18 U.S.C. 4108(a)(2), thus making petitioner eligible for parole immediately upon commencement of his sentence, rather than only after serving one-third of his term, the point

of first eligibility under a "straight" sentence. 18 U.S.C. S4202. On February 25, 1976, following the affirmance of petitioner's conviction by the United States Court of Appeals for the Second Circuit and the denial of a petition for a writ of certiorari by the United States Supreme Court, petitioner surrendered and commenced serving his sentence.

Petitioner contends that he was denied due process on November 21, 1975 at the time of his sentencing since on that date this Court -- like other District courts -- had a view of the effect of imposing sentence under 18 U.S.C. S4202(a)(2) quite different from the view entertained and implemented by the United States Parole Board. Because of the material disparity between the Court's intention and the Parole Board's unpublished policy petitioner's sentence is open to collateral attack under 28 U.S.C. S2255.

# I.

IN SENTENCING DEFENDANTS FEDERAL COURTS HAVE  
INTERPRETED AND RELIED UPON 18 U.S.C. S4202(a)(2)  
AS IF THE UNITED STATES BOARD OF PAROLE WERE  
GIVING ADMINISTRATIVE EFFECT TO IT, BUT THE  
BOARD HAS ROUTINELY DISREGARDED 4202(a)(2)  
SENTENCE PROVISION

It has been the acknowledged general understanding of the federal courts that an adult offender sentenced under S4202(a)(2) will be immediately eligible for parole, will be given serious consideration for parole prior to the conclusion of one-third of his sentence, and ordinarily will be paroled at least by that point if the prisoner's institutional performance and progress warrant early release. Persuasive authorities attest to



this judicial understanding of the law. E.g., Kortness v. United States, 514 F.2d 167, 17 CrL 2123, 8th Cir. April 21, 1975; Garafola v. Benson, 505 F.2d 1212, 1216-1219 (7th Cir. 1974); United States v. Slutsky, 514 F.2d 1222, 17 CrL 2122, 2d Cir. April 2, 1975, Grasso v. Norton, 371 F. Supp. 171 (D.Conn. 1974); Grasso v. Norton, 370 F. Supp. 116 (D. Conn. 1974); Reed v. United States, 388 F. Supp. 725, 728 (D. Kan. 1975); Diaz v. Norton, 376 F. Supp. 112 (D.Conn. 1974); see generally, Guego, Goldberger & Jackson, Project: Parole Release Decision Making and the Sentencing Process, 84 Yale L.J. 810, 882-897 (1975); Note, 17 CrL 1026 (May 14, 1975). Contrary to the common viewpoint of the court system, however, the United States Board of Parole has in fact adopted a policy which results in offenders sentenced under S4208(a)(2) routinely serving more than one-third of their sentence regardless of institutional performance and progress. Essentially, the Board of Parole policy and guidelines vitiate S4208(a)(2) sentencing intention.

The Honorable Frank G. Theis described the above problem well in his recent decision in Reed v. United States, 388 F. Supp. 725, 728 (D.Kan. 1975) when he stated:

"The Court has frequently referred to the S4208 (a)(2) sentence as a "boot-strap" sentence, and has imposed such sentences with the understanding and expectation that it would provide a beneficial opportunity for moral reform rather than a handicap. Section 4208(a)(2) is intended to permit those sentenced pursuant thereto an element of control over their future by making the date of their release contingent, at least in part, upon their conduct while in the institution. It is hoped that such a sentence will thereby serve a rehabilitative function. Prisoners sentenced under Section 4208(a)(2) appear to be handicapped, not benefitted, and the purpose of that section is therefore



frustrated, if not defeated, unless an (a)(2) prisoner has a meaningful opportunity to present his request for parole at least as early and effectively as the non-(a)(2) prisoner. Most trial judges share this view. At a sentencing Institute held in Springfield Missouri, in April, 1974, for the district and appellate judges of the Eight and Tenth Circuits, it was the near unanimous opinion that congressional intent and judicial interpretation were being nullified by the administrative policy of the Parole Board in handling S4208(a)(2) prisoners." (Emphasis added)

Petitioner's institutional performance and progress had been and are rated as excellent. His "salient factor score" under Board of Parole guidelines for parole eligibility is six. The Board of Parole, which has denied petitioner parole, has in no way questioned or faulted petitioner's prison behavior or his complete rehabilitation.

Petitioner submits that it was this Court's expectation at the time of original sentencing and its understanding of the effect of a S4208(a)(2) sentence that if these circumstances just enumerated materialized, as they have, petitioner could have been parole by this point in his sentence instead of being continued to the expiration of his term based on circumstances -- namely, the alleged "offensive behavior" -- which this Court had taken into account in the first instance in pronouncing sentence. Because the Court's sentence was predicated on an unintentional misunderstanding of Board policy, the Court should rectify this "miscarriage of justice", see Davis v. United States, 417 U.S.333.

In conclusion, the merits of petitioner's claim seem too plain and well backed by precedent to warrant elaborate



discussion. It must of course be noted that petitioner seeks resentencing in order to rectify the original misunderstanding, as in Kortness v. United States, supra, and United States v. Slutsky, supra, and not litigation against parole authorities, as in Reed v. United States, supra. Ultimately, of course, the particular merits can only be answered after this Court looks back to the days when it imposed petitioner's sentence, of O'Shea v. United States, 491 F.2d 774, 778-780 (1st Cir.1974) and determines what it believed the actual effect of a S4203(a)(2) sentencing provision was.

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\*The ground stated by the Board of Parole, Atlanta Region, in denying petitioner's parole was as follows:

"Your offense behavior has been rated as very high severity, because the total offense behavior included use of a weapon and the truck driver was detained against his will. You have a salient factor score of 6. You have been in custody of a total of 6 months. Guidelines established by the commission for Adult cases which consider the above factors indicate a range of 36-48 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted."

## II.

IF AT THE TIME OF SENTENCING PETITIONER, THIS COURT WAS UNAWARE OF THE BOARD'S UNPUBLISHED ADMINISTRATIVE POLICY WHICH LARGELY NULLIFIES 18 U.S.C. S4208(a)(2), IT HAS THE POWER UNDER 28 U.S.C. S2255 TO VACATE PETITIONER'S SENTENCE AND RESENTENCE HIM.

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A federal court may determine whether its sentence was predicated upon materially untrue assumptions and 28 U.S.C. S2255 empowers it to correct such a miscarriage of justice in the imposition of sentence. *Kortness v. United States*, 514 F.2d 167, 17 CrL 2123, 8th Cir., April 21, 1975. Any other interpretation misconstrues the reach of Section 2255.

28 U.S.C. Section 2255 provides in pertinent part:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time."

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner



as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate."

As can be seen Section 2255 not only can perform the full service of habeas corpus by effecting the discharge of the prisoner but also can enable the vacation of a sentence and resentencing of the petitioner. "Such a remedy is precisely authorized by this statute." Andrews v. United States, 373 U.S.334, 339 (1963).

Turning to the problem at bar, the rule is that where the trial court in exercising its sentencing discretion acts under a material misapprehension of law or fact, the defendant has been denied due process and his sentence is open to collateral attack under Section 2255. E.g., Kortness v. United States, *supra*; United States v. Lewis, 392 F.2d 440 (4th Cir. 1968); Robinson v. United States, 313 F.2d 817 (7th Cir.1963); Hamilton v. Salter, 361 F.2d 579 (4th Cir. 1966) (per curiam); United States v. Tucker, 404 U.S. 443 (1972); United States ex rel. Jackson v. Myers, 374 F.2d 707 (3d Cir.1967); United States v. Malcolm, 432 F.2d 809 (2nd Cir.1970); United States v. Perchalla, 407 F.2d 821 (4th Cir.1969) (per curiam). Cf., United States v. Weston, 448 F.2d 626 (9th Cir.1971).

In United States v. Lewis, 392 F.2d 440 (4th Cir.1968) the court squarely held under the circumstances of that case that "28 U.S.C. Section 2255 authorizes review of a permissible maximum sentence imposed under a misapprehension of law, but unappealed," 392 F.2d at 441. Specifically, in Lewis the

defendant/petitioner was placed on probation for five years pursuant to his conviction for the interstate transportation of a stolen motor vehicle. Six months later, his probation was revoked and he was committed under 18 U.S.C. Section 4208(a)(2) for an indeterminate term of five years, the statutory maximum for the crime. There was no appeal, but subsequently Lewis moved under Section 2255 for relief from this sentence.\*

Petitioner's theory was that his sentence had been pronounced under a mistaken impression of the judge that 18 U.S.C. Section 4208(a)(2) required imposition of the maximum sentence imprisonment permissible for the given offense. The District Court denied his motion and the Court of Appeals reversed.

The appellate court held that the record was clear "as to the court's concept of the force of 4208(a)(2)" and that 4203(a)(2) does not mandate the heaviest sentence. 392 F.2d at 442.

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\*The defendant there also invoked Rule 35 of the Federal Rules of Criminal Procedure. The Court of Appeals, however, held that since the motion was not brought within 120 days of the sentencing session, it was untimely for the modification of a sentence "Imposed in an illegal manner." The Court of Appeals further held that within the definition found in Hill v. United States, 368 U.S. 424 (1962), the sentence was not an "illegal sentence" which, of course, can be corrected at any time under Rule 35. 392 F.2d at 442.

The recent decision of the United States Court of Appeals for the Ninth Circuit in United States v. United States District Court, Central District of California, et al., \_\_\_ F.2d \_\_\_, Nos. 74-2134, 74-2135, Jan. 20, 1975, is in accordance with the foregoing view of Rule 35 timeliness.



The question considered at length was whether or not Section 2255 could be utilized to rectify the trial court's misconception. In answering the question affirmatively, the Fourth Circuit stressed the statutory words permitting the motion if the sentence is "otherwise subject to collateral attack" and noted that allowance of resort to Section 2255 was in the interests of justice. 392 F.2d at 440. And, appropriately, the court remarked, "Unless the (petitioner) here can avail himself of Section 2255, he will be serving a sentence imposed contrary to the wish and will of the sentencing court." 392 F.2d at 443 (emphasis added).

One of the cases relied upon by the Fourth Circuit in Lewis was Robinson v. United States, 313 F.2d 817, 4th Cir. 1963). In Robinson, the defendant had been convicted on four counts of a narcotics indictment and sentenced to various concurrent terms of imprisonment. The judgment and commitment order further specified that the defendant would become eligible for parole under the provisions of 18 U.S.C. Section 4208(a)(2). No appeal was taken.

Defendant subsequently filed a Section 2255 petition which alleged, inter alia\*, that his sentence was void and he should be resentenced because the trial court erroneously included in the judgment a reliance upon Section 4208(a)(2), which another statute makes inapplicable to any offense for which there is provided a "mandatory penalty". (The disqualifying statute is a

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\*The defendant/Petitioner in Robinson also prevailed in his collateral attack upon two counts of his indictment which failed to state an offense.



Public Law omitted from codification in the United States Code.) Defendant Robinson's convictions were for such offenses. Thus, the sentencing judge concededly "acted under a misapprehension of law," 313 F.2d at 821, and the Seventh Circuit Court of Appeals concluded "that the judgment must be corrected." Id. It rejected the government's argument that the reference to Section 4208(a)(2) should be disregarded as surplusage and pointed out that the attempt to sentence under Section 4208(a)(2) obviously manifested an intention to mitigate the force of the sentence. See also, Hamilton v. Salter, 361 F.2d 579, 581 (4th Cir. 1966) (per curiam): "if...the sentences were passed in the Federal Court on a misunderstanding of the effect of the concurrency provision, relief on those premises can be sought...by motion in the sentencing court under 28 U.S.C. Section 2255."

The rule illustrated above is not limited only to errors of law.

In United States v. Tucker, 404 U.S. 443 (1972), the United States Supreme Court affirmed the Ninth Circuit Court of Appeals in reversing the denial of a Section 2255 motion for resentencing. At the time of Tucker's initial sentencing, the trial court was unaware of the correct factual circumstances of his background. The federal district judge gave consideration to defendant's record of three previous felony convictions, which he had admitted under cross-examination. Several years later, it was conclusively determined in unrelated proceedings in another court that two of the prior convictions were constitutionally invalid because defendant had there been unrepresented by



Section 2255 relief, namely, resentencing in light of the true facts. See also, United States ex rel. Jackson v. Myers, 374 F.2d 707 (3d Cir. 1967).

In the instant case, the effective doubling of petitioner's sentence as a result of the trial Court's probably unawareness of the United States Board of Parole's then-unpublished policy of applying Section 4208(a)(2) without regard to the sentencing court's intention -- indeed, as if the federal court and Section 4208(a)(2) were irrelevencies -- amounts to "such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack" and to render the sentence imposed "otherwise open to collateral attack." 28 U.S.C. Section 2255.\*

Directly in point is the recent decision of the United States Court of Appeals for the Eighth Circuit in Kortness v. United States, 514 F.2d 167, 17 CrL 2123, 8th Cir., April 21, 1975. The Section 2255 petitioner in that case was sentenced under Section 4208(a)(2) before the Parole Board practice and policy became generally known (specifically, on the very day the guidelines were first published in the Federal Register). The court

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\*There is no doubt that Section 2255 extends to nonconstitutional as well as constitutional claims. Davis v. United States, 417 U.S. 333 (1974). Petitioner's claim of basic sentencing injustice has both dimensions.



recognized that "(w)ithout access to these guidelines, the sentencing judge was entitled to assume that" the 4208(a)(2) provision would make a difference in the inmate's parole prospects. Kortness v. United States, supra, at p.6 of the slip opinion. And, since the contrary was true, the Court of Appeals held that petitioner was entitled to relief under Section 2255:

It is clear to us that because of the high compliance rate by the Board of Parole with its published regulations, a sentencing judge who seeks to make any meaningful use of Section 4208(a)(2) needs to be aware of these guidelines so he may properly take into account parole eligibility during the prison term. Under the circumstances of this case, where the Board of Parole may not have informed the sentencing court of new procedures, the court may have imposed sentence under a mistaken belief that the defendant would receive meaningful parole consideration during his Section 4208(a)(2) term, rather than be required almost automatically to serve the full term imposed, less good time allowances. We think this factual situation is akin to that considered by the Fourth Circuit in (United States v. Lewis (392 F.2d 440 (4th Cir. 1968))) and calls for similar relief. The case is remanded to the sentencing judge to exercise his discretion whether or not to modify Kortness' sentence in light of the guidelines promulgated by the Board of Parole."

Petitioner, like Kortness, was sentenced under Section 4208(a)(2) before Board policy was generally communicated to the judiciary. Like Kortness, he therefore has stated a claim cognizable under Section 2255. The Court has the power to maintain the integrity of its sentencing and to relieve petitioner of the fundamental sentencing injustice which has arisen from the exceptional circumstances shown in his Petition to Correct Sentence.



### DISCUSSION

The principal claim of petitioners here is that they are entitled to vacation of their sentences and resentencing because their treatment at the hands of the United States Board of Parole does not comport with the intentions of this court at the time of sentencing them pursuant to the provisions of 18 U.S.C. Section 4208(a)(2). 18 U.S.C. Section 4208(a)(2) provides in relevant part:

- (a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may . . . .
- (2) . . . . fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

Petitioners claim that the court intended at the time of sentencing under Section 4208(a)(2) to be providing a benefit to petitioners by rendering them eligible for early parole consideration, that the Board of Parole by rigidly imposing its guidelines by extending the parole date beyond the guidelines has acted in a manner not within the knowledge or contemplation of this court at the time of sentencing, and that, accordingly, petitioners should be resentenced in light of the information on Board of Parole practices now available to the court.

The Board of Parole first promulgated its guidelines including customary total time served before release, on November 19, 1973, prior to sentencings in this case.



38 Fed. Reg. 31942, now codified at 28 C.F.R. Section 2.20. The Board guidelines do not expressly mention and give no consideration, special or otherwise, to 18 U.S.C. Section 4208 (a)(2) sentences as contrasted with straight 18 U.S.C. Section 4202 sentences, which provided for parole eligibility after services of one-third of the sentence.

From the point of view of this court at the time of sentencing under Section 4208(a)(2), institutional adjustment of the defendant was expected to be the most important consideration used by the Board of Parole in deciding whether or not to grant parole. The Section 4208(a)(2) sentence was imposed with the thought that, if the defendant's rehabilitation in prison was exemplary the Board of Parole might grant him parole before the one-third point in his sentence, with the lengthy remainder of the sentence available to insure that the defendant complies with the law during the period of parole supervision. By use of the salient factor score and guidelines as the sole determinant of the actual prison time to be served by Joseph Addoloria, his term was extended beyond the guidelines, without regard to exemplary prison record, the Board of Parole effectively eliminated in custody performance as a criterion for release. When sentencing Addoloria under Section 4208(a)(2), prison performance was the particular criterion which this court contemplated would be considered by the Board of Parole in setting a release date.



The second argument consists of an attack on the difference between the parole hearings available to a Section 4208(a)(2) and Section 4202 prisoners. Prisoners sentenced under Section 4202 receive their first in-person hearing before the Board after expiration of one-third of the sentence, the first time they are eligible for parole consideration. Prisoners sentenced under Section 4208(a)(2) receive their first in-person hearing before the Board shortly after commencing their sentence. Since the duration of their term in prison at that time is normally too short to support a judgment on quality of prison performance, parole is routinely denied to Section 4208(a)(2) prisoners at the initial hearing. Under parole board regulations then applicable, Section 4208(a)(2) prisoners would not receive an in-person hearing at the one-third point of their sentence, but would only receive a review on the written record, since they had received the earlier in-person hearing. The evidence indicates that a review on the written record is not as likely to result in parole as an in-person hearing. The argument of the Section 4208(a)(2) prisoner is that the parole board regulations which resulted in his not receiving an in-person hearing at the expiration of one-third of his sentence violates Section 4208(a)(2) which, he contends, requires him to be treated at least as well, if not better, with respect to opportunity for parole than prisoners sentenced under Section 4202. While not expressly urged by Addoloria, this argument, if accepted by the court, would appear to apply to his situation.



The argument outlined above was adopted by the United States Court of Appeals for the Seventh Circuit in Garafola v. Benson, 505 F.2d 1212 (7th Cir. 1974). In Garafola, the order of the Board denying parole to five petitioners were vacated with directions to the Board of Parole to provide the prisoners sentenced under Section 4208(a)(2) the same kind of hearing provided to prisoners sentenced under Section 4202. The argument was rejected however, in a more recent decision by the United States Court of Appeals for the Second Circuit, Grasso v. Norton, \_\_\_\_\_ F.2d \_\_\_\_\_ (2nd Cir. 6/23/75). The Second Circuit concluded, one judge dissenting, that "the combination of the initial institutional hearing and the file review on the record at the one-third point of the sentence provided by revised 28 C.F.R. Section 2.14(b) gives the (a)(2) prisoner as effective and meaningful parole consideration as is afforded the non-(a)(2) prisoner by the institutional hearing given when one-third of his sentence has expired. This is all that 18 U.S.C. Section 4208(a)(2) requires. Slip Opinion at 4310. Accord, Moddy v. United States Board of Parole, No. C74-601 A (N.D. Ga. 4/1/74), aff'd without opinion 502 F.2d 1165 (5th Cir. 1974) and Stroud v. Weger, 380 F. Supp. 897 (M.D. Pa. 1974).

The regulatory structure, that underlies the above disputes was modified at the July 31, 1975 meeting of the United States Board of Parole to provide effective August 1, 1975, that full scale in-person hearings be held not only within three months but also at the expiration of one-third of the sentence of Section 4208(a)(2) prisoners. 28 C.F.R. Section 2.14(b).\*

\* (Per Office of the General Counsel of the United States Board of Parole, revised regulations to be published on or about September 5, 1975).



The administrative modification of the nature of the hearings now available to (a)(2) prisoners makes it unlikely that the grievance presently asserted by Addoloria will be heard in the future. In light of this court's disposition of petitioner's first claim and the administrative action providing full hearings to (a)(2) prisoners in the future, it is not necessary for this court to rule upon the challenge to the Board of Parole practice of providing a different mode of review to (a)(2) prisoners at the one-third point of their sentence.

Before requesting the order of the court, two additional arguments of the government must be discussed. The government may argue that petitioner Addoloria should have filed his claim in the United States District Court for the Central District of Georgia, the judicial district in which petitioner is incarcerated. Courts generally make opinions that as an attack on the sentences filed under 28 U.S.C. Section 2255 the cases are properly before the sentencing court, and no jurisdictional defect exists in this respect.

The government may also argue that the petition should be dismissed for failure to exhaust administrative remedies, since Addoloria did not pursue all of the possible internal Board of Parole appeals from the denial of parole. On these facts, this court should not be convinced that dismissal of the petition is warranted. First of all, the question before this court is primarily one of law which is not likely the Board of Parole would have decided, particularly in light of its history of adherence to the previously promulgated applicable



regulations. Second, Addoloria will be eligible for mandatory release in any event sometime in December 14, 1982. The delay inherent in administrative appeals might well have made judicial intervention useless, even if justified. Furthermore, the claim advanced is peculiarly one addressed to the sound discretion of the sentencing court and would not likely have been reached by the administrative process. In light of the foregoing factors, this court should decline to follow Talerico v. United States Board of Parole, No. 75-134 Civil (M.D.Pa. 3/4/75), which dismissed a writ of habeas corpus alleging unlawful denial of parole for failure of the petitioner to appeal to the National Appellate Board of the United States Board of Parole.

#### CONCLUSION

Petitioner has been duly sentenced by this Court. The sentence was undoubtedly based upon factors properly considered as relevant to his grave judicial responsibility. The concern of petitioner is his fear that the Court's sentencing intention and expectation have been frustrated by the Parole Board's administrative nullification of 18 U.S.C. Section 4208(A)(2). Petitioner has not been given the meaningful consideration for early parole release which he understood was envisioned by Section 4208(a)(2). In fairness to the petitioner, and to the Court, under 28 U.S.C. Section 2255 the sentence previously imposed can and should be vacated. Petitioner should be resen-



tenced by this Court with full cognizance of the Parole Board's policy which -- correctly or incorrectly -- has removed all flexibility and leniency from Section 4208(a)(2).

Respectfully submitted.

---

HAROLD L. GOERLICH  
380 North Broadway  
Jericho, New York 11753  
(516) 921-2200

| OFFICE | YR. | NUMBER | MO. | DAY | YEAR | J | N/S | O | R | 23 | S | OTHER | JUDGE<br>NUMBER | JURY<br>DEM. | DOCKET<br>YR. | NUMBER    |
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**APPEAL**

## PLAINTIFFS

Addoloria, Joseph

Joseph Addoloria

## DEFENDANTS

USA

United States of America

28 USC 1346

CAUSE

2255

Related Case: 75CR 275/Platt, J

## ATTORNEYS

For Pltff:

Harold Goerlich

380 N. Broadway

Jericho, New York 11753

Tel 516-922-2200

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Joseph Addorria

vs

USA

NR.

## PROCEEDINGS

7 Notice of motion to vacate sentence filed. (1)

7 Memo of law filed. (2)

7 By PLATT, J Memo & Order dtd 2-28-77 denying petitioner's motion to vacate sentence. Copies mailed. (3)

Judgement dtd 3/1/77 filed that the petitioner take nothing of the respondent and that the application to reduce or vacate sentence is denied. (4)

Notice of appeal filed. Copy to USA and to C of A. mg (5)

7 Scheduling order from Court of Appeals that record on appeal be filed on or before 4/1/77, filed. (6) 29

7 Civil appeal scheduling order #2 ret 5-2-77 filed. (7)

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK  
-----X

JOSEPH ADDOLORIA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.  
-----X

NOTICE OF MOTION

Docket No. \_\_\_\_\_

S I R S :

PLEASE TAKE NOTICE that upon the annexed petition of JOSEPH ADDOLORIA, and upon all the proceedings heretofore had herein, the undersigned will move this Court on the 18th day of February, 1977, at a Motion Term thereof at the Courthouse located at the United States Courthouse, Foley Square, New York New York, for orders (a) that an order to show cause issue forthwith against respondent answering why his sentence should not be vacated and reimposed in accordance with the informed understanding of the Court, (b) that petitioner be admitted to bail pending final disposition of this petition, (c) that an order be entered vacating petitioner's sentence, (d) that he be resentenced in accordance with the Courts intention, and (e) that the Court grant such further additional relief as it deems just and proper.

Dated: Jericho, New York

Yours, etc.

HAROLD L. GOERLICH  
Attorney for Petitioner  
380 North Broadway  
Jericho, New York 11753  
(516) 921-2208

TO: DAVID G. TRAGER  
United States Attorney  
Eastern District of New York  
Attorney for United States of America  
225 Cadman Plaza East  
Brooklyn, New York 11201



## PETITION (pp A-3 to A-8)

David G. Trager  
 United States Attorney  
 Eastern District of New York  
 225 Cadman Plaza East  
 Brooklyn, New York 11201

Harold L. Goerlich  
 380 North Broadway  
 Jericho, New York 11753  
 (516) 921-2200

COUNSEL FOR PETITIONER

UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF NEW YORK

JOSEPH ADDOLORIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. \_\_\_\_\_

PETITION TO CORRECT SENTENCE

Petitioner, JOSEPH ADDOLORIA, alleges and complains  
 as follows:

SUMMARY OF SUIT

This post-conviction action is brought by petitioner sentenced in the United States District Court for the Eastern District of New York under Indictment No. 75 CR 275 serving his nine-year sentence incarcerated in the United States Prison, Atlanta, Georgia. The prisoner petitions the trial court pursuant to 28 U.S.C. § 2255 and Rule 35 of the Rules of Criminal Procedure to vacate and correct his sentence in order to comply with and satisfy the court's basic intention at the time of imposition.

Upon judgment and sentence on November 21, 1975 petitioner was convicted on all three counts and sentenced to a total of nine years under Title 18 U.S.C. 4308(a)(2) and suspended



sentence of five years probation on the last count to run consecutively.

Having taken an appeal which was affirmed February 25, 1976, after which Certiorari to the United States Supreme Court was filed and the lower court action was affirmed and Writ of Certiorari was denied on October 4, 1976. Therefore, petitioner has one hundred twenty (120) days from October 4, 1976 to file the instant motion and be within the rules proscribed in which to file for reduction or modification of vacation of sentence.

The initial parole hearing was in August of 1976 which was continued by the parole examiner because of insufficient information from this Court filed.

Petitioner believes and alleges that when the Court (the Honorable Thomas Platt), Judge Presiding) pronounced judgment committing him to a term of nine years in the custody of the Attorney General explicitly "under the provisions of Title 18, Section 4208(a)(2), United States Code" it intended that the result of such a sentence would be petitioner's parole at least by the completion of one-third of his term --naturally upon conditions subsequent of good institutional conduct and program performance and very good parole prognosis. But, it is respectfully submitted, the Court, like practically all other District Courts at the time, had a view of the effect of a 54208(2)(2) sentence far different from the view entertained by the United States Board of Parole. It was the unpronounced policy of the Parole Board to ignore 54208(a)(2) orders in a Judgment and Commitment and, specifically, it was and remains the Parole Board's policy to give no weight in parole decision-making to the crucial factor that the sentencing judge relied upon 54208(a)(2). In the instant case the Parole Board has in fact acknowledged but ignored petitioner's excellent prison performance and parole prognosis, believes itself free to disregard even its own guidelines for release, and has continued his parole to the expiration of his sentence



based on the Board's own unelaborated view that earlier release "would depreciate the seriousness of the offense committed and thus is incompatible with the welfare of society." As a consequence petitioner will be compelled to spend about 52 months in prison rather than the approximate 36 months or less which he believes was intended by the sentencing court.

In his claim for relief petitioner does not ask the Court to resolve any conflict between its own vision of S4208(a)(2) sentencing and that adopted by the Parole Board. Rather, he calls upon the Court now to account for the effect of Parole Board policy by simply vacating and correcting his sentence under 28 U.S.C. S2255 so as to accord with its original intention. He claims that unless the Court resentsences him fully apprised of the Board's administrative nullification of S4208(a)(2), the unknowing imposition of his nine-year sentence under the intended benevolent provisions of S4208(a)(2) will amount to a complete miscarriage of justice fundamentally doubling the penalty for his crime without any Due Process of Law.

#### JURISDICTION

1. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. S2255. *+ Rule of Crim. Procedure 35*

#### PARTIES

2. Petitioner, JOSEPH ADDOLORIA, is a federal prisoner under sentence of this Court presently *on file* in custody of *as Personal Recognizance Bond* the United States Prison at Atlanta, Ga.

3. Respondent, UNITED STATES OF AMERICA, was the plaintiff prosecuting authority and is the designated proper party respondent in a proceeding under 28 U.S.C. S2255. *and Rule of Crim. Procedure 35*

#### CLAIM FOR RELIEF

4. Petitioner believes and alleges on information and belief that at the time of imposing sentence and denying reduction thereof the District Court believed that the effect



of its specific reliance on 18 U.S.C. §4208(a)(2) sentencing would be special consideration of petitioner's paroleability and -- upon satisfactory institutional performance and progress and satisfactory parole success prognosis -- his release by the completion of one-third of this sentence, ie., after 36 months of imprisonment, or less.

5. On April 27, 1976, petitioner surrendered as ordered by the Court and commenced serving his sentence.

6. The initial parole hearing was in August of 1976 which was continued by the parole examiners.

7. The petitioner after his initial parole hearing continued in October 1976 wherein the action of this hearing was again continued until October 1978 making a total time of 31 months which in effect denies the benefit of parole consideration until one-third of the total sentence has been served nullifying the intent of the sentencing court.

8. Clearly the congressional intent of A-2 sentence was to provide a remedy where the trial court would be able to set an early date for release as established in the provisions of Title 18 §4202 which makes a defendant eligible for a meaningful parole eligibility at one-third of the total sentence.

9. When this Court originally imposed sentence the statement of the Court was that the petitioner's response to treatment in confinement would determine at what point in time in the sentence this petitioner would be released.

10. Clearly from the attached statement from the Parole Board as to their guidelines and salient factor score, it does not mention one factor that exists now other than what existed at the time of sentencing.

11. The Second Circuit has shown a keen interest in the conduct of Quasi Judicial Conduct of the Parole Board where in sentencing the courts intentions have been subverted. In the instant case it is very clear, if the court intended this petitioner to serve three (3) years before being eligible for



parole, it could have very well sentenced the petitioner to an adult type sentence of three (3) to nine (9) years, and the parole board guidelines would have been met. The attached response from the U.S. Parole, states categorically, "Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 36-48 months to be served before release for cases with good institutional program performance and adjustment."

12. Clearly from the above statement, this action does not set a release date at the end of 48 months by the guidelines but merely makes this petitioner eligible for another parole hearing at the end of the 36-48 month period. The fact of the matter is that this petitioner has already been informed that no matter what the Judge says, with the charge of "kidnapping" implicated in this case, this petitioner can look to serve the majority six (6) years of his sentence here at Atlanta Federal Penitentiary. Yet there is absolutely no charge of "kidnapping" in the indictment under which the petitioner was convicted.

13. Petitioner submits that this court's intention is very definitely being subverted and this court should take the action of several other Judges in Gusman v. United States, CR 73-0363; Kortness v. United States F-2d-17 CRL 2123, 8th Circuit April 21, 1975; Garafola v. Benson 505 f.2d 1212, 1216, 1219 (7th Cir. 1974); United States v. Slutski, F.2d - 17 Crl. 2122, 2d Cir. April 18, 1975 at 2988-2995 of the Slip Opinion; Grasso v. Norton 371 F. Supp. 171 (D. Conn.) 1974; Grasso v. Norton, 376 F. Supp. 116 (D. Conn. 1974); Reed v. United States, 388 F. Supp. 725, 723 C.D. Kan. 1975; Diaz v. Norton, 376 F. Supp. 112 (D. Conn. 1974); See generally Gengo, Goldburger & Packson: Project: Parole Release decision making and the sentencing Process. 84 Yale L.J. 810-882-897 (1975); Note 17 CRL 1026 (May 14, 1975).

14. The above cases indicate a view contrary to the common viewpoint of the court. The Parole Board's guidelines and policies vitiate or overrule the sentencing intention of



S4203(a)(2) and of the original intent when the statute was enacted by Congress.

15. The concern of petitioner is that the court's sentencing intention has been frustrated by the Parole Board's Administrative Nullification of 18 U.S.C. 4208(a)(2).

16. Petitioner continues to serve his sentence and to receive highly favorable Progress Reports from his Case Management Team. At the time of filing the instant petition, petitioner has served more than 8 months in prison and believes he will continue to serve until his mandatory release date unless his petition to this Court is granted.

17. By the foregoing circumstances it appears, most respectfully, that petitioner's sentence was founded on an understandable but prejudicial unawareness of the actual administrative effect of sentencing under 18 U.S.C. S4203(a)(2). The sentence imposed therefore has denied petitioner due process of law under the Fifth Amendment to the United States Constitution and is otherwise subject to collateral attack.

#### DEMAND FOR RELIEF

18. Petitioner prays (a) that an order to show cause issue forthwith against respondent answering why his sentence should not be vacated and reimposed in accordance with the informed understanding of the Court, (b) that petitioner be admitted to bail pending final disposition of this petition, (c) that an order be entered vacating petitioner's sentence, (d) that he be resentenced in accordance with the Court's intention, and (e) that the Court grant such further additional relief as it deems just and proper.

Respectfully submitted,

JOSEPH ADDOLORIA  
Petitioner

By his attorneys,

---



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x

JOSEPH ADDOLORIA,

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Petitioner,

MEMORANDUM AND  
ORDER

-against-

February 28, 1977

UNITED STATES OF AMERICA,

Respondent.

-----x

PLATT, D.J.

Joseph Addoloria has filed a motion pursuant to Rule 35, Federal Rules of Criminal Procedure, and Title 28 U.S.C. § 2255 "to vacate and correct" the sentence imposed upon him by this Court.

Petitioner was found guilty after a jury trial of the crimes of interstate theft (title 18 U.S.C. § 659) (count one), conspiracy (title 18 U.S.C. § 371) (count two), and use of a firearm in the commission of a felony (title 18 U.S.C. § 924(c)(1)) (count three). On November 21, 1975, the Court sentenced him to terms of nine (9) years on count one, five (5) years on count two, to run concurrently with count one, and nine (9) years on count three. Execution of the sentence on count three was suspended and the petitioner was placed on probation for five (5) years to run consecutively with the sentences imposed on counts one and two. The sentences on counts one and two were imposed pursuant to the former provisions of Title 18 U.S.C. § 4208(a)(2).

Petitioner argues herein that in imposing sentence pursuant to § 4208(a)(2) the Court contemplated that he would



2.

be paroled "at least by the completion of one-third of his term".

In U.S. v. Slutsky, 514 F.2d 27 (2d Cir. 1975), the Second Circuit discussed at length the development of the parole guidelines that petitioner contends frustrate the Court's intent in sentencing him pursuant to § 4208(a)(2). The guidelines were adopted in November, 1973. 38 Fed.Reg. 31912 (1973). The regulations were revised following the decision in Grasso v. Norton, 371 F.Supp. 171 (D.Conn. 1974) (Grasso I); 39 Fed.Reg. 20028 (1974); See 28 C.F.R. § 2.14(b). These revised regulations were upheld in Grasso v. Norton, 520 F.2d 27 (2d Cir. 1975) (Grasso II).

Contrary to petitioner's contention, in sentencing him pursuant to former § 4208(a)(2), the Court fully intended to give the parole authorities the discretion provided for in the statute to determine petitioner's release date.

Accordingly, petitioner's application to reduce or vacate the sentence imposed upon him by this Court must be, and the same hereby is, denied.

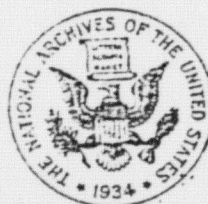
SO ORDERED.



U.S.D.J.



FRIDAY, SEPTEMBER 5, 1975



PART IV:

# DEPARTMENT OF JUSTICE

Parole Board

PAROLE, RELEASE,  
SUPERVISION AND  
RECOMMITMENT OF  
PRISONERS, YOUTH  
OFFENDERS, AND  
JUVENILE DELINQUENTS

Revised Rules

NO  
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## RULES AND REGULATIONS

## Title 28—Judicial Administration

## CHAPTER I—DEPARTMENT OF JUSTICE

## PART 2—PAROLE, RELEASE, SUPERVISION AND RECOMMITMENT OF PRISONERS, YOUTH OFFENDERS, AND JUVENILE DELINQUENTS

## Parole Board

(A) *Background.* On December 31, 1974, the United States Board of Parole published in the *Federal Register* at 39 FR 45296 a notice of proposed rule-making setting forth the rules proposed for publication at Part 2, Title 28, of the Code of Federal Regulations governing parole, release, supervision, and recommitment of prisoners, youth offenders, and juvenile delinquents. A deadline of March 3, 1975, was established for the submission of written statements or comments on the proposed regulations. On March 10, 1975, the deadline was extended to May 4, 1975, (40 FR 10996) and on May 2, 1975, was again extended by 60 days to July 3, 1975. (40 FR 19204). Copies of the proposed rules were placed in Federal institutions throughout the country to facilitate prisoner comment. The full text of the proposed rules may be found at 40 FR 10973 (March 10, 1975).

Prior to December 31, 1974, the Board of Parole published its regulations in the Code of Federal Regulations without providing opportunity for public comment as provided in the Administrative Procedure Act, 5 U.S.C. § 553(b)(3). In so doing, the Board was acting on the assumption that even if it was an agency within the meaning of that statute, its regulations fell, in any event, within the exemptions provided at 5 U.S.C. § 553(b)(3) for interpretative and procedural rules, and statements of general policy.

Subsequent litigation in *Pickus v. United States Board of Parole*, 507 F.2d 1101 (D.C. Cir. 1974) resulted in a ruling that the Board of Parole was an agency as defined by the Administrative Procedure Act and held that the Board was required to comply with the notice and comment section, 5 U.S.C. § 555(b)(3). The court expressly held that its decision did not touch upon the substantive validity of the Board's regulations.

The Board, therefore, republished its rules on an emergency basis at 39 FR 45223 (December 31, 1974), with notice of proposed rule-making as described above. These rules were later amended at 40 FR 535 (February 5, 1975) and at 40 FR 10973 (March 10, 1975).

Written statements and comments were received from 18 different sources: five from attorneys, seven from individual prisoners, three from committees of prisoners, one from a parolee, one from a Bureau of Prisons employee, and one from a public interest group (The Institute for Public Interest Representation, Georgetown University Law Center). All of these comments were carefully considered by the Board prior to the Board's quarterly meeting held July 30-31, 1975, in Atlanta, Georgia.

(B) *Rule changes.* As finally adopted and set forth below, these regulations contain a number of substantive changes

from the March 10, 1975, publication (40 FR 10973). The changes made will be discussed in this section, together with those comments found relevant to the changes. Other comments are evaluated and discussed in the following section.

The changes made are as follows: (a) Section 2.14(b), (*Review Hearings*) was changed to provide that a prisoner sentenced under the Youth Corrections Act, Federal Juvenile Delinquency Act, or under 18 U.S.C. § 4208(a)(2), or 924(a) shall not be continued past one-third of his maximum sentence without a further, in-person hearing upon completion of one-third of his maximum sentence. This practice became effective for prisoners who complete one-third of their maximum sentences after August 1, 1975. Prior to this change, § 2.14(b) provided for a review on the record with a current institutional progress report, rather than an in-person hearing. This rule provoked considerable criticism, and a number of comments urged the change presently adopted. While, the Board does not believe that constitutional due process or the statutes concerned require this result (see *Grasso v. Norton*, — F.2d —, No. 74-1222 (2d Cir., decided June 23, 1975)), it was concluded that the better course would be to modify this rule as adopted.

(b) A number of rules were amended to reflect existing practices of the Board and the Bureau of Prisons concerning the prisoner's opportunities to review the information in his official records, and to correct errors of fact appearing therein. The Board has amended its former regulations that emphasized confidentiality as the general rule, in order to conform to applicable laws governing disclosure of federal records. These changes are discussed below:

(1) Section 2.11(d) (*Application for Parole*), has been changed to provide that prisoners shall be furnished with an Inmate Background Statement (Parole Form I-32) for completion prior to the initial hearing. This form permits the prisoner to present his version of the factors which make up his salient factor score. Completion of this form with the assistance of the prisoner's case worker will provide for a more meaningful hearing on the salient factor score, and will serve to point up immediately areas of disagreement on the facts. This rule change reflects present policy and was urged by several comments.

(2) Section 2.13(a) (*Initial Hearing*) has been changed to provide that the examiner panel at an initial hearing shall discuss with the prisoner his offense severity rating and salient factor score as described in § 2.20(c), his institutional conduct, and, in addition, any other matters the panel may deem relevant. This requirement codifies the present practice and ensures that the prisoner will be afforded the opportunity to respond at the hearing to those assumptions of fact upon which the panel relies in computing the offense severity rating and salient factor score.

(3) Section 2.57 (*Disclosure of Records*), paragraphs (a) through (c) have

been changed to provide for access by the prisoner to factual reports.

This rule incorporates a procedure recently implemented by the Bureau of Prisons which provides for disclosure of the central file maintained at the institution in which the prisoner is confined. See Bureau of Prisons Policy Statement No. 2211.8, *Inmate Review of Central Files*, dated June 12, 1975. The central file is the file from which the initial parole hearing and all subsequent review hearings are conducted. At the time of the prisoner's initial classification, his central file is assembled and a duplicate file of the basic documents is prepared for the later use of the Board of Parole. After the initial hearing, the duplicate, or parole file, is sent to the appropriate Board of Parole regional office and is thereafter the repository of all Board of Parole internal memoranda and administrative records concerning the prisoner, as well as updated material duplicated from the central file.

The procedure employed by the Bureau of Prisons is to segregate material exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b), at the time of the initial classification. The prisoner may thereafter make an appointment with his case worker to review the non-exempt documents and obtain copies thereof. Documents withheld may be sought through written request to the Bureau of Prisons, under applicable statutes and regulations governing disclosure of government documents.

The retention of four narrowly drawn exemptions to disclosure in § 2.57(a) was found necessary to protect vital interests, both of the government, and of private persons whose names or identities appear in the prisoner's file. These exemptions parallel those contained in the Freedom of Information Act, 5 U.S.C. § 552(b), and the Federal Rules of Criminal Procedure, Rule 32, dealing with disclosure of the Presentence Investigation Report.

With regard to Presentence Investigation Reports furnished to the Bureau of Prisons and Board of Parole, the Board has been advised by the Administrative Office of the United States Courts that this report does not become a document of the Bureau of Prisons or Board of Parole upon receipt from the U.S. Probation Office, which can be disclosed under applicable statutes governing disclosure of government documents. The sentencing court retains the sole authority to disclose the report. *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968). The regulation at Subparagraph (c), places the responsibility for seeking disclosure of the Presentence Report upon the prisoner, as a matter to be resolved between the prisoner and his sentencing court. However, it should be borne in mind that each prisoner will have been afforded the opportunity to review that report, prior to sentencing, to the extent required by Rule 32, Federal Rules of Criminal Procedure, as amended August 1, 1975.

The above changes will operate in conjunction with a number of related provisions. The principal provision is that



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## RULES AND REGULATIONS

contained in § 2.15, which provides for reasons in the case of parole denial. The reasons given indicate the number of months in custody, the salient factor score, offense severity rating with reasons for the rating if not apparent from the conviction, the guideline range indicated, reasons for going outside the range where such a decision is made) and any other reason supporting the decision. The salient factor scoresheet, showing each point given or withheld for each of the nine salient factor score items, is furnished to the prisoner as a part of the reasons given.

Prisoners are also afforded a two-level administrative appeal procedure in § 2.25 and 2.26. Written statements may be submitted on appeal to the Regional Director under § 2.25, and to the National Appellate Board under § 2.26.

Section 2.57(d) was added to notify prisoners and other persons of their rights to make written requests for disclosure of documents in Board of Parole files, pursuant to the Privacy Act of 1974 and the Freedom of Information Act, by complying with the applicable Department of Justice regulations.

While the Board maintains the position that properly framed reasons for parole denial afford the prisoner a sufficient basis for an effective exercise of his rights to appeal (see *Fisher v. United States*, 382 F. Supp. 241 (D. Conn. 1974)), it recognizes that prisoners often seek to obtain copies of the tape recordings of their parole hearings and the Hearing Examiner's Summary (Parole Form H-1). Copies of tape recordings are furnished to prisoners upon request. The Bureau of Prisons provides recording equipment which enables prisoners to listen to these tapes. Technical difficulties with recording equipment sometimes result in inaudible or garbled recordings. Thus, the Board is not in a position to guarantee an accurate recording of every hearing. Hearing Summaries, which are prepared for the convenience of the examiners and the Board Members participating in the decision-making process, are disclosed subject to exemptions provided by law.

Section 2.12(b) (*Application for Parole*) was changed to delete a provision relating to confidentiality of parole records in order to avoid possible conflict with the disclosure provisions described above. It is nonetheless the Board's policy to avail itself of statutory exemptions to disclosure where appropriate, for example, in order to prevent clearly unwarranted invasions of the personal privacy of prisoners, ex-convicts, and persons communicating with the Board on the assumption of confidentiality.

(c) Section 2.20(c) (*Paroling Policy Guidelines*) has been changed in a number of specific instances.

(1) The severity of Firearms Act violations was felt to be greater than the severity categories (low-moderate and moderate) to which such offenses were formerly assigned. Thus, the possession, purchase, or sale of a single weapon (not a sawed-off shotgun or machine gun) was placed in the moderate severity category

of offenses, and the possession, purchase, or sale of a sawed-off shotgun, machine gun, or multiple weapons, was placed in the high severity category of offenses. This change does not preclude decisions below the guideline range indicated when circumstances mitigating the seriousness of the offense are presented to the Board. Sawed-off shotguns were expressly included in this rule change since the possession of such a weapon indicates the unlikelihood of an innocent purpose in the violation. A sawed-off shotgun is generally a weapon purposefully altered to facilitate criminal concealment, and its use presents an unusually grave threat to the personal safety of the victim or innocent bystanders.

(2) In the moderate severity category of offenses, smuggling of aliens was changed to include the smuggling or transporting of aliens, since the Board felt that the individual who transports an alien who has been smuggled into the country, as part of the general scheme to complete the smuggling offense, has committed a crime which cannot, for this purpose, be rationally differentiated from the act of smuggling itself.

(3) It is further concluded the offense of possession of hard drugs with intent to distribute or sell, in order to support a drug habit, should be consolidated with possession/sale for profit in the very high severity category. The Board found that the factor of drug addiction is no more consistent or valid a mitigating circumstance than any other which might be found, and that the serious consequences inherent in this offense could not justify the severity category to which it had previously been assigned. Thus, the Board has determined that offenses involving the possession of hard drugs with intent to distribute or sell warrant a very high severity rating, with the exception of those involving a prior conviction for the same offense, to which the greatest severity rating is presently assigned. However, mitigating or aggravating circumstances may warrant a decision above or below the guideline range indicated.

(4) In relation to the offense of counterfeiting currency, the Board amended the offense behavior description in the high category to read counterfeiting currency, Passing/Possession (\$20,000-\$100,000) making it consistent with other property related offenses in that category.

(5) One item in the salient factor score was changed. Cocaine or barbiturate dependence was found to be a somewhat less reliable predictive factor in general than heroin (opiate) dependence, and was, therefore, deleted from Item F. That item now reads: "no history of heroin or opiate dependence." This does not, however, preclude the Board from considering abuse of the drugs noted or other drugs as a negative indicant on an individual basis.

(6) The definition of Item G, High School Graduate or GED Completed was clarified to refer to such completion prior to the prisoner's present commitment. Completion of a GED during the

present commitment (found to be a weaker predictive item) is appropriately considered in relation to institutional program achievement.

(d) Section 2.32 (*Committed Fines*) has been changed to reflect more clearly the operation and effect of the governing statute 18 U.S.C. § 3569. The regulation as amended places the responsibility for resolving questions involving payment or discharge of prisoners' committed fines upon the chief executive officer of the institution, as provided by statute. One comment called attention to the need for this change.

(e) Section 2.58 (*Special Parole Term*) was revised to provide guidance as to the operation of the special parole term required for certain drug offenses. 21 U.S.C. §§ 8801-966.

(f) Section 2.13(d) (*Initial Hearing*) was changed to provide that notice to the prisoner of the examiner panel's tentative decision shall be mailed within 15 working days, except in emergencies, in order to conform to present practice.

(C) *Evaluation of other comments received.* The comments received by the Board following publication of its proposed rule-making on December 31, 1974, raised a number of difficult issues regarding paroling policy. Many of these issues are valid concerns, even though the specific proposals offered by the writers were not acceptable to the Board at this time. These issues will continue to be given serious attention in the future.

(1) *The paroling policy guidelines.* Nearly every comment received referred to some aspect of the Board's Paroling Policy Guidelines at § 2.20.

Generally, the guidelines were criticized for failing to consider with sufficient emphasis, rehabilitation or institutional progress. However, one comment stated that although prison performance is relevant to the parole decision, the Board's guidelines correctly de-emphasize rehabilitative factors which social science suggests can neither be detected nor measured.

We support the development of detailed guidelines for decision-making not only because of the Board's stated goals, but also because § 2.20 as applied by the Board serves other commendable purposes. First, by its choice of criteria, the Board has made clear that it has de-emphasized rehabilitative factors as a condition of release. Extensive social science research strongly suggests that rehabilitation can neither be observed, detected or measured. An inmate's institutional behavior and performance should be relevant to the parole decision, however, and we support the Board rule allowing this factor to justify decisions outside the range indicated by the guidelines. Second, to a large degree the guidelines remove inmate uncertainty as to how much time they will have to serve. Because the release criteria in § 2.20 are based almost exclusively upon data fixed at the time of conviction, when he first enters prison, an inmate can calculate with great accuracy the average time he will have to serve.

(Statement submitted by the Institute for Public Interest Representation, Georgetown University Law Center, dated May 2, 1975, at Page 3-4).



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It should be noted, however, that the Board's guidelines do not totally exclude consideration of institutional discipline or program achievement. First, the guidelines are predicated upon good institutional performance. Secondly, exceptionally good or poor institutional performance may be considered as a reason for a decision above or below the guidelines.

There were also several specific proposals. One comment urged the Board to set parole dates early in a prisoner's term to remove uncertainty. This proposal is presently being put into practice by one state parole board (California), and the United States Board of Parole will study the results of that policy. In the Federal system, a prisoner continued for an institutional review hearing (when that continuance is not limited by Board policy) will frequently be paroled at that date, absent institutional misconduct.

Several comments suggested that sentence length play some role in the guideline evaluation. While this factor is listed at § 2.13(a)(2), the Board has rejected the proposal that sentence length in itself be included in the guidelines. Such a course would defeat one of the primary benefits of the Board's guidelines, which is to reduce sentence disparity, an important goal endorsed in comments received by the Board. Of course, facts which may have persuaded the sentencing court to impose a shorter or longer than average sentence will be presented to the Board in the Presentence Investigation Report, and may influence the Board to render a decision above or below the guideline range indicated. Moreover, the sentencing courts' specific recommendations regarding parole will be considered, in addition to other relevant information, by the Board.

Several comments singled out Item I of the Salient Factor Score as discriminating against unmarried individuals. This item is, however, a strong indicator of parole prognosis. In addition, it should be pointed out that only nine of the 11 possible points on the salient factor score are required in order to achieve the most favorable parole prognosis category.

Regarding the offense severity categories, one comment suggested that all ratings be based on offense of conviction only. A corollary suggestion was that all Federal statutory offense descriptions be listed on the severity scale. The Board presently considers the total circumstances of the offense committed (offense behavior) and exercises its best judgment as to the correct rating in each case. Rigidly codifying offenses by statutory section would preclude objective assessment of the actual offense behavior, and would place excessive reliance on convictions obtained more often by negotiation of pleas than by trial of the facts. Neither justice nor uniformity of treatment could be achieved with such a system, and the Board has, therefore, found the proposal unacceptable.

Another comment urged that the severity ratings be empirically validated

(i.e., based on a poll of community opinion), citing Rossi, *The Seriousness of Crime*, 39 Am. Soc. Ref. 224 (April, 1974). While this proposal does not account for Congressional delegation of authority to the Board in 18 U.S.C. § 4203 to consider "the welfare of society," the type of research suggested by the proposal could be useful to the Board, on a long term basis, in the exercise of this authority. Serious consideration will be given to future studies in this field.

Regarding the factual basis for computing the guideline evaluation, one comment suggested that the Board require, by amended regulation at § 2.9 (*Study prior to sentencing*), that the United States Probation Officers include a guideline evaluation in preparation of the Presentence Investigation Report. For the Board's purposes, the factual basis for the guideline evaluation is presently included in these reports. Moreover, as noted above the prisoner provides information regarding his salient factor score in his background statement. The preparation of the determinative guideline evaluation is properly the task of a Board of Parole hearing examiner panel, and must be accomplished at a parole hearing pursuant to § 2.13 of the Board's regulations.

However, the preparation of a prospective guideline evaluation by probation officers could be an aid in the sentencing process if it is used to inform the court of the manner in which the Parole Board will exercise its discretion, rather than as a predetermination of the Board's final evaluation.

The Board notes that United States Probation Officers in the Southern District of New York, and other Probation Officers at the request of individual judges in other districts, currently prepare guideline evaluations for the benefit of the sentencing court.

(2) *Hearing Procedure.* Various aspects of the hearing procedure at § 2.12 were criticized. Two comments were made that the rule of representatives should be expanded to provide for their participation throughout the hearing. This proposal is not acceptable because the parole hearing is not an adversary proceeding, but an evaluative interview. The present regulation provides that the prisoner's representatives may offer a statement at the conclusion of the hearing and respond to questions of the examiner panel during the course of the hearing. There is no restriction in the present rule against the appearance of a lawyer as the prisoner's representative.

Another comment suggested that written notice of the hearing be given 30 days in advance. The Board's regulation at § 2.12(a) provides for written notice prior to a hearing.

However, a rigid 30 day notice requirement would not account for those prisoners transferring into an institution and who are placed on the next hearing docket on short notice. (Hearing examiner panels regularly visit each institution at two month intervals). If a prisoner

at initial hearing believes that the notice given is inadequate to allow for preparation for the hearing or for the attendance of his representative, he may request the examiner panel to postpone his hearing until the next docket.

With regard to prisoners serving concurrent state and local sentences in state, local, or territorial institutions, two comments proposed that in-person parole hearings be granted by the Board. The present regulation at § 2.16(b) provides for reviews on the record for such prisoners. These prisoners are heard by the state or territorial parole authorities having jurisdiction over them. Upon a grant of parole from such authority, the Board will review its record to determine whether or not to grant parole at that time if it has not previously granted parole to that prisoner upon a record review. If the Board does not grant parole, the prisoner is returned to a Federal institution, and if he has not previously received an in-person parole hearing from the Board, and is otherwise eligible for parole, he will be scheduled for a hearing on the next docket following his transfer to the institution.

(3) *Appellate procedure.* Comments regarding the Board's appellate procedure generally emphasized the possibility for delays inherent in the absence of a time limit for rendering appeal decisions. While the Board has succeeded in rendering timely appeal decisions in most cases, it will continue to study means of expediting appeals as it evaluates the progress of the regional system which opened in 1974.

One comment pointed out the apparent futility of an appeal under § 2.23 to a Regional Director who has previously referred the examiner panel decision to the National Directors for decision under § 2.24. It was considered necessary to require this appeal since prisoner appeals may contain new or corrected information following receipt of the notice of action (reasons) and the salient factor scoresheet. As a matter of administrative policy, new information should be presented first at the regional level, rather than the national level, to allow the Regional Director full consideration of the case.

(4) *Mental competency hearing procedure.* One comment advanced the position that a § 2.35 mental competency hearing is an adversary proceeding requiring written notice, representation by counsel, and the opportunity to present favorable psychiatric testimony. The competency hearing, however, is an inquiry only into the prisoner's ability to understand the nature of and participate in the parole or parole revocation hearing. Implicit in the regulation is the understanding that the Board of Parole and the Bureau of Prisons will attempt to hold the parole or parole revocation hearing if at all possible, or at the earliest opportunity, in order to achieve a speedy resolution of the merits of the case.

(D) *Conclusion.* Accordingly, pursuant to the authority of 28 CFR, Chapter 1, Part 0, Subpart I, and 18 U.S.C. 4201-



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210 and 5005-5037, 28 CFR Chapter 1, Part 2, is amended as set forth below, effective October 6, 1975.

Approved: August 29, 1975.

Dated: August 29, 1975.

MAURICE H. SIGLER,

Chairman,

United States Board of Parole.

- Sec.  
2.53 Warrant placed as a detainer and dispositional interview.  
2.54 Revocation by the Board, preliminary interview.  
2.55 Local revocation hearing.  
2.56 Revocation hearing procedure.  
2.57 Disclosure of Records.  
2.58 Special Parole Team.

AUTHORITY: 18 U.S.C. 4201-4210, 5001-5047; 28 CFR Part O, Subpart V.

### § 2.1 Definitions.

(a) For the purpose of this part, the term "Board" means the United States Board of Parole; and the terms "Youth Correction Division" and "Division" each mean the Youth Correction Division of the Board.

(b) As used in this part, the term "National Appellate Board" means the Chairman, Vice Chairman, and at least one member of the Board, all of whom also serve as National Appellate Board members in the headquarters office, i.e., Washington, D.C.

(c) All other terms used in this part shall be deemed to have the same meaning as identical or comparable terms have when those terms are used in Chapter 311 of Part IV of Title 18 of the United States Code or Chapter I, Part O, Subpart V of Title 28 of the Code of Federal Regulations.

### § 2.2 Eligibility for parole, regular adult sentences.

Except as set out in the following sections, a federal prisoner wherever confined and serving a definite term or terms of over one hundred and eighty days may, in accordance with the regulations prescribed in this part, be released on parole after serving one-third of such term or terms or after fifteen years of a life sentence or a sentence of over forty-five years (18 U.S.C. 4202).

### § 2.3 Same; adult indeterminate sentences.

A Federal prisoner, other than a juvenile delinquent or a committed youth offender, who has been sentenced to a maximum term of imprisonment in excess of one year may, if the court has designated a minimum term to be served, which term may be less than, but not more than, one-third of the maximum sentence imposed, be released on parole after serving the minimum term. In cases in which a court imposes a maximum sentence of imprisonment upon a prisoner and specifies that the prisoner may become eligible for parole at such times as the Board may determine, the prisoner may be released on parole at any time in the discretion of the Board (18 U.S.C. 4208(a)).

### § 2.4 Same; juvenile delinquents.

The Board of Parole shall release from custody, on such conditions as it deems necessary, each juvenile delinquent who has been committed, as soon as the Board is satisfied that he is likely to remain at liberty without violating the law and when such release would be in the interest of justice (18 U.S.C. 5041).

### § 2.5 Same; committed youth offenders.

The Youth Correction Division may at any time, after reasonable notice to the Director of the Bureau of Prisons, release conditionally under supervision a committed youth offender. A youth offender committed under section 5010(b) of title 18 of the United States Code to a maximum six year term shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction. A youth offender committed under section 5010(c) of title 18 of the United States Code to a maximum term which is more than six years shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court (18 U.S.C. 5017).

### § 2.6 Same; sentences under the Narcotic Addict Rehabilitation Act.

The Narcotic Addict Rehabilitation Act provides for sentence to a maximum term for treatment as a narcotic addict. Parole may be ordered by the Board after at least six months in treatment, not including any period of time for "study" prior to final judgment of the court. Before parole is ordered by the Board, the Surgeon General or his designated representative must certify that the prisoner has made sufficient progress to warrant his release and the Attorney General or his designated representative must also report to the Board whether the prisoner should be released. Recertification by the Surgeon General prior to rep parole consideration is not required (18 U.S.C. 4254).

### § 2.7 Same; sentences under the gun control statute.

A Federal prisoner sentenced under 18 U.S.C. 924(a) for violation of Federal gun control laws is considered eligible for parole at such time as the Board may determine. Prisoners sentenced under this provision are considered for parole in the same manner as if they had been sentenced under 18 U.S.C. 4208(a)(2).

### § 2.3 Same; sentences of six months or less followed by probation.

A Federal prisoner sentenced under 18 U.S.C. 3651 to serve a period of six months or less in a jail type or treatment institution, with a period of probation to follow, is not eligible for parole.

### § 2.9 Study prior to sentencing.

(a) When an adult Federal offender has been committed to an institution by the sentencing court for observation and study prior to sentencing under the provisions of 18 U.S.C. 4208(b), the report to the sentencing court is prepared and submitted directly by the United States Bureau of Prisons.

(b) The court may order a youth to be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the

- Sec.  
2.1 Definitions.  
2.2 Eligibility for parole, regular adult sentences.  
2.3 Same; adult indeterminate sentences.  
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2.5 Same; committed youth offenders.  
2.6 Same; sentences under the Narcotic Addict Rehabilitation Act.  
2.7 Same; sentences under the gun control statute.  
2.8 Same; sentences of six months or less followed by probation.  
2.9 Study prior to sentencing.  
2.10 Date service of sentence commences.  
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2.12 Hearing procedure.  
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2.28 Reopening of cases.  
2.29 Withheld and forfeited good time.  
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2.32 Committed fines.  
2.33 Parole to detainees, statement of policy.  
2.34 Parole to local or immigration detainees.  
2.35 Mental competency proceedings.  
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2.37 Rescission of parole.  
2.38 Sponsorship of parolees; statement of policy.  
2.39 Mandatory release in the absence of parole.  
2.40 Same; youth offenders.  
2.41 Reports to police departments of names of parolees; statement of policy.  
2.42 Community supervision by United States Probation Officers.  
2.43 Duration of period of community supervision.  
2.44 Conditions of release.  
2.45 Travel by parolees and mandatory releases.  
2.46 Supervision reports, modification and discharge from supervision.  
2.47 Modification and discharge from supervision; youth offenders.  
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2.49 Revocation of parole or mandatory release.  
2.50 Same; youth offenders.  
2.51 Unexpired term of imprisonment.  
2.52 Execution of warrant; notice of alleged violations.



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Youth Correction Division shall report its findings to the court (18 U.S.C. 5010(e)).

### § 2.10 Date service of sentence commences.

(a) Service of a sentence of imprisonment commences to run on the date on which the person is received at the penitentiary, reformatory, or jail for service of the sentence: *Provided, however*, That any such person shall be allowed credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.

(b) Service of the sentence of any person who is committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served shall commence to run from the date on which he is received at such jail or other place of detention.

(c) Service of the sentence of a committed youth offender or a person committed under the Narcotic Addict Rehabilitation Act commences to run and continues to run uninterruptedly from the date of conviction, except when such offender is on bail pending appeal or is in escape status.

### § 2.11 Application for parole.

(a) A prisoner, other than a juvenile delinquent, a committed youth offender, or an offender committed under the Narcotic Addict Rehabilitation Act, desiring to apply for parole shall execute such application forms as may be prescribed by the Board. Such forms shall be available at each Federal institution and shall be provided to prisoners eligible for parole. Such prisoners may waive parole consideration on a form provided for that purpose. If such a prisoner waives parole consideration, he may later supply for parole and may be heard during the next visit of the Board to the institution where he is confined, provided he has applied prior to 45 days from the first scheduled date of this visit. A prisoner who receives an initial hearing may not waive any subsequent review hearing scheduled by the Board except as provided in § 2.16(c). New parole applications are not necessary for such review hearings.

(b) A prisoner who is required to apply before receiving a parole hearing but who fails to submit either an application or a waiver form shall be referred to the Board's representatives by the chief executive officer of the institution. The prisoner shall then receive an explanation of his right to apply for parole at a later date.

(c) Prisoners committed under the Federal Juvenile Delinquency Act, the Youth Correction Act, and the Narcotic Addict Rehabilitation Act shall be considered for parole without application and may not waive parole consideration.

(d) Notwithstanding the above provisions relating to parole application, all prisoners prior to initial hearing shall be provided with an inmate background statement by the Bureau of Prisons for completion by the prisoner.

### § 2.12 Hearing procedure.

(a) Prisoners shall be given written notice of the time and place of the hearing described in §§ 2.13 and 2.14. Prisoners may be represented at hearings by a person of their choice. The function of the prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner panel, and to provide such additional information as the examiner panel shall request. Interested parties who oppose parole may select a representative to appear and offer a statement. The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statement.

(b) No interviews with the Board, or any representative thereof, shall be granted to a prisoner unless his name is docketed for a hearing in accordance with Board procedures. Hearings shall not be open to the public, and the records

### § 2.13 Initial hearing.

(a) An initial hearing shall be conducted by a panel of two hearing examiners designated by the Board. The examiner panel shall discuss with the prisoner his offense severity rating and salient factor score as described in § 2.20, his institutional conduct, and, in addition, any other matter the panel may deem relevant. At the conclusion of the hearing, the examiner panel shall inform the prisoner of its tentative decision, and, if parole is denied, of the reasons therefor.

(b) In accordance with § 2.13 the reasons for parole denial may include, but are not limited to, the following reasons, with further specification where appropriate:

(1) Release at this time would deprecate the seriousness of the offense committed and would thus be incompatible with the welfare of society.

(2) There does not appear to be a reasonable probability at this time that the prisoner would live and remain at liberty without violating the law.

(3) The prisoner has (a serious) (repeated) disciplinary infraction(s) in the institution.

(4) Additional institutional treatment is required to enhance the prisoner's capacity to lead a law-abiding life.

(c) In lieu of or in combination with the reasons in paragraph (b) (1) and (2) of this section the prisoner after initial hearings shall be furnished a guideline evaluation statement which includes the prisoner's salient factor score and offense severity rating as described in § 2.20, as well as the reasons for a decision to continue the prisoner for a period outside the range indicated by the guidelines.

(d) Written notification of the decision or referral under § 2.17 or § 2.24 shall be mailed or transmitted to the prisoner within fifteen working days of the date of the hearing except in emergencies. If parole is denied, the prisoner shall also receive in writing as a part of the decision, the reasons therefor.

### § 2.14 Review hearings.

All hearings subsequent to the initial hearing shall be considered as review

hearings. Review hearings by examiners designated by the Board shall be scheduled for each Federal institution, and prisoners shall appear for such hearings in person, except for the following cases:

(a) During the month preceding a regularly scheduled review hearing, a case may be reviewed on the record by an examiner panel (including a current institutional progress report). If the decision is to grant parole, no hearing shall be conducted.

(b) A prisoner sentenced under the Youth Corrections Act or Federal Juvenile Delinquency Act or a prisoner sentenced to a maximum term of more than 18 months under 18 U.S.C. 4208(a)(2) or 924(a) shall not be continued past one-third of his maximum sentence at an initial hearing without further hearing upon completion of one-third of his maximum sentence.

(c) Notification of review decisions shall be given as set forth in § 2.13(d). No prisoner shall be continued for more than three years from the time of last hearing without further review.

### § 2.15 Petition for consideration of parole prior to date set at hearing.

When a prisoner has met the minimum time of imprisonment required by law, the Bureau of Prisons may petition the responsible Regional Director for reopening the case under § 2.23 and consideration of parole prior to the date set by the Board at the initial or review hearing. The petition must show cause why it should be granted, i.e., an emergency, hardship, or the existence of other extraordinary circumstances that would warrant consideration of early parole.

### § 2.16 Parole of prisoner in state or territorial institution.

(a) Any person who has been convicted of any offense against the United States which is punishable by imprisonment but who is confined thereafter in a state reformatory or other state or territorial institution, shall be eligible for parole by the Board on the same terms and conditions by the same authority, and subject to recommitment for the violation of such parole, as though he were confined in a Federal penitentiary, reformatory, or other correctional institution.

(b) Federal prisoners serving concurrent state and Federal sentences in state, local, or territorial institutions shall be furnished upon request parole application forms. Upon receipt of the application and any supplementary classification material submitted by the institution, the parole decision shall be made by an examiner panel of the appropriate region on the record only.

(c) Prisoners who are serving federal sentences exclusively but who are being boarded in state, local or territorial institutions may be considered for parole on the record only, provided they sign a waiver of their right to a personal hearing. If such a prisoner does not waive a personal hearing, he may be transferred by the Bureau of Prisons to a Federal institution where he will be considered for



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parole at the next visit by an examiner panel of the Board.

### § 2.17 Original jurisdiction cases.

(a) A Regional Director may designate certain cases as original jurisdiction cases. The Regional Director shall then forward the case with his vote, and any additional comments he may deem germane, to the National Directors for decision. Decisions shall be based upon the concurrence of three votes with the appropriate Regional Director and each National Director having one vote. Additional votes, if required, shall be cast by the other Regional Directors on a rotating basis as established by the Chairman of the Board.

(b) The following criteria will be used in designating cases as original jurisdiction cases:

(1) Prisoners who have committed serious crimes against the security of the Nation, e.g., espionage, or aggravated subversive activity.

(2) Prisoners whose offense behavior (A) involved an unusual degree of sophistication or planning or (B) was part of a large scale criminal conspiracy or continuing criminal enterprise.

(3) Prisoners who have received national or unusual attention because of the nature of the crime, arrest, trial, or prisoner status, or because of the community status of the offender or his victim.

(4) Long-term sentences. Prisoners sentenced to a maximum term of forty-five years (or more) or prisoners serving life sentences.

### 2.18 Granting of parole.

The granting of parole rests in the discretion of the Board of Parole. The Board may parole a prisoner who is otherwise eligible if (a) in the opinion of the Board such release is not incompatible with the welfare of society; (b) he has observed substantially the rules of the institution in which he is confined; and (c) there is a reasonable probability that he will live and remain at liberty without violating the laws (18 U.S.C. 208(a)).

### § 2.19 Consideration by the Board.

In the exercise of its discretion, the Board generally considers some or all of the following factors and such others as it may deem appropriate:

(a) Sentence data:  
(1) Type of sentence;  
(2) Length of sentence;  
(3) Recommendations of judge, U.S. Attorney, and other responsible officials.

(b) Present offense:  
(1) Facts and circumstances of the offense;

(2) Mitigating and aggravating factors;

(3) Activities following arrest and prior to confinement, including adjustment on bond or probation, if any.

(c) Prior criminal record:

(1) Nature and pattern of offenses;

(2) Adjustment to previous probation, parole, and confinement;

(3) Detainers.

(d) Changes in motivation and behavior:

(1) Changes in attitude toward self and others;

(2) Reasons underlying changes;

(3) Personal goals and description of personal strength or resources available to maintain motivation for law abiding behavior.

(e) Personal and social history:

(1) Family and marital history;

(2) Intelligence and education;

(3) Employment and military experience;

(4) Physical and emotional health.

(f) Institutional experience:

(1) Program goals and accomplishments:

(i) Academic;

(ii) Vocational education, training or work assignments;

(iii) Therapy.

(2) General adjustment:

(i) Inter-personal relationships with staff and inmates;

(ii) Behavior, including misconduct.

(g) Community resources, including release plans:

(1) Residence; live alone, with family or others;

(2) Employment, training, or academic education;

(3) Special needs and resources to meet them.

(h) Results of scientific data and tools.

(1) Psychological tests and evaluations;

(2) Statistical parole experience tables (salient factor score).

(i) Paroling policy guidelines as set forth in § 2.20;

(j) Comments by hearing examiners, evaluative comments supporting a decision, including impressions gained from the hearing.

### § 2.20 Paroling policy guidelines; statement of general policy.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Board of Parole has adopted guidelines for parole release consideration.

(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for the cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered. For example, cases with exceptionally good institutional program achievement may be considered for earlier release.

(d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) These guidelines do not apply to parole revocation or reparole considerations. The Board shall review the guidelines periodically and may revise or modify them at any time as deemed appropriate.



Joseph Addoloria

Appellant-Respondent

against

AFFIDAVIT OF SERVICE  
MAIL

United States of America

Appellant-Respondent

STATE OF NEW YORK, COUNTY OF NASSAU

SS:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at  
129 W. Beech St., Long Beach, N.Y. 11561

That on the 23 day of May, 1977 deponent served 2 copies  
of the attached ~~Record on Appeal~~ - Brief (and appendix)-.

on David C. Trager, U.S. Attorney-E.D. N.Y.

attorney(s) for Appellant-Respondent

in this action at 225 Cadman Plaza East  
Brooklyn, N.Y. 11201

the address designated by said attorney(s) for that purpose-by depositing a true  
copy of same enclosed in a postpaid properly addressed wrapper, in-a post office -  
mail box,by delivering to and leaving same during regular business hours, of the  
United States Postal Service within the State of New York.

Sworn to before me this

23 day of May, 1977

SIGN

Stuart Davis

PRINT NAME